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COURT OF CRIMINAL APPEALS OF TEXAS

MICKEY RAY PERKINS — Appellant

v.

THE STATE OF TEXAS, — Appellee

On Appeal from the 35TH District Court
of Brown County, Texas
Cause No. CR24903
(Hon. Stephen Ellis)

and

Cause No. 11-18-00037-CR
from the
THE COURT OF APPEALS FOR THE ELEVENTH JUDICIAL DISTRICT
EASTLAND, TEXAS

PETITION FOR DISCRETIONARY REVIEW

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ATTORNEY FOR MICKEY RAY PERKINS

IDENTITY OF TRIAL COURT, PARTIES AND COUNSEL

In accordance with Rule 68.4(a) of the Texas Rules of Appellate Procedure, the following is a list of names and addresses of the trial court, parties and counsel:

Trial Court:	Hon. Stephen Ellis 35TH Judicial District Brown County Courthouse 200 South Broadway Brownwood, Texas 76801
Appellant:	Mickey Ray Perkins
Trial Counsel for Appellant:	Angie Hadley P.O. Box 336 De Leon, Texas 76444
Appellate Counsel for Appellant:	Frederick Dunbar 7242 Buffalo Gap Road Abilene, Texas 79606
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PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Mickey Ray Perkins, (hereinafter sometimes referred to as "Perkins,") submits this Petition for Discretionary Review, and would respectfully show unto

the Court the following:

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because the Court of Appeals' decision contradicts the opinions of this Court regarding what constitutes legally sufficient evidence of serious bodily injury, an important issue. Additionally, the Court of Appeals contradicted the opinions of this Court regarding 403 and 404(b) analysis.

STATEMENT OF THE CASE

Perkins was charged by indictment with aggravated assault with a deadly weapon against a family member, Lana Hyles, the deadly weapon being a car dashboard. (CR 13). The offense was alleged to have been committed on August 30, 2016. (CR 13). On January 25, 2018, the Court sentenced Perkins to twenty-seven years confinement in the Texas Department of Criminal Justice and a fine of $5000.00 in accordance with the jury's findings. (CR 143-5).

STATEMENT OF PROCEDURAL HISTORY

Perkins appealed to the Eleventh Court of Appeals at Eastland, Texas. In an opinion authored by the Honorable Jim Wright, Senior Chief Justice, released on February 28, 2020, the Court affirmed Perkins' conviction. (Apx. A).

GROUNDS FOR REVIEW

Issue One

The Court of Appeals erred in holding the evidence legally sufficient to establish serious bodily injury.

Issue Two

The Court of Appeals erred in holding the trial court acted within its discretion in allowing the State to introduce extensive details about an extraneous offense during the guilt-innocence phase when Perkins was willing to stipulate to it.

ARGUMENT AND AUTHORITIES

Issue One Restated

The Court of Appeals erred in holding the evidence legally sufficient to establish serious bodily injury.

Argument and Authorities for Issue One

When there is a challenge to the sufficiency of the evidence to sustain a criminal conviction, the question presented is whether, after viewing all the evidence in the light most favorable to the verdict, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The reviewing court may impinge on the trier of fact's discretion only to the extent necessary to guarantee the fundamental protection of due process of law. *Id*. The *Jackson* standard is the only standard that a reviewing court applies in determining whether the evidence is sufficient to prove the defendant's guilt beyond a reasonable doubt. *Brooks v. State*,

323 S.W.3d 893, 912 (Tex. Crim. App. 2010). This standard is "barely distinguishable" from the factual sufficiency standard articulated in *Clewis v. State,* 922 S.W.2d 126 (Tex.Crim.App.1996). *Brooks,* 323 S.W.3d at 312. (Overruling *Clewis*' acknowledgement of a distinct factual sufficiency standard.).

The Court of Criminal Appeals emphasized although it is the jury's prerogative to believe or disbelieve elements of evidence an appellate court must review the rationality of the jury's findings in light of all the evidence. *Id.,* at 907. The Court encouraged a "rigorous and proper" application of the *Jackson v. Virginia* legal-sufficiency standard arguing it is "as exacting a standard as any factual-sufficiency standard (especially one that is " barely distinguishable" or indistinguishable from a *Jackson v. Virginia* legal-sufficiency standard)." *Id.* The sufficiency of the evidence is measured against a hypothetically correct jury charge. *Fuller v. State,* 73 S.W.3d 250, 252 (Tex.Crim.App.2002).

Tex. Pen. Code 1.07(a)(46) states:

> (46) "Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Perkins will address substantial risk of death last, as that is what the Court of Appeals seems to have focused on.

Clearly, Hyles did not die, so there is legally insufficient evidence that the injury inflicted caused death.

The evidence of loss or impairment of function, the following evidence was adduced:

Q. Has the -- apart from the cut to your nose, has your nose been affected in any other way? (RR8: 95).

A. No, sir.

Q. Did your nose swell at all?

A. Yes, sir.

Q. Okay. And did that disrupt the use of your nose for some time?

A. Oh, yes, sir. I had two black eyes and -- yes, swollen, nasty, ugly, bruised nose.

This is far too vague to establish "protracted" loss or impairment of function. "Some time" is not necessarily protracted, and is far too vague allow the trier of fact or the reviewing court to rationally determine whether or not it was protracted.

The evidence fails as to serious permanent disfigurement. A reviewing court must find more than mere scarring alone; instead, it must find in the record evidence of "some significant cosmetic deformity" in order to conclude that the evidence of serious bodily injury was sufficient. *Sizemore v. State*, 387 S.W.3d 824, 828 (Tex.App.— Amarillo 2012, pet. ref' d); *Hernandez v. State*, 946 S.W.2d

108, 113 (Tex.App.— El Paso 1997, no pet.). The fact that an injury causes scarring is not sufficient, on its own, to establish serious permanent disfigurement. *Sizemore*, 387 S.W.3d at 828; see, e.g., *Hernandez v. State*, 946 S.W.2d 108, 113 (Tex. App.-El Paso 1997, no pet.) (finding evidence of one-inch scar from stab wound in addition to a surgical scar insufficient to "elevate 'bodily injury' to 'serious bodily injury'"); *McCoy v. State*, 932 S.W.2d 720, 724 (Tex. App.-Fort Worth 1996, pet. ref'd) (concluding evidence of slight scar on lip, though permanent, was not sufficient to show serious permanent disfigurement).

Rather, the record must support a finding of "some significant cosmetic deformity" in order to conclude that the evidence of serious bodily injury is sufficient. *Sizemore*, 387 S.W.3d at 828. Serious bodily injury may be established without a physician's testimony when the injury and its effects are obvious. *Id.* The following testimony by Hyles addresses the nature of the injury of her nose:

> Q. The injury that you suffered to your nose, do you still bear a scar from that -- A. Yes, sir.
>
> Q. -- cut? Has it gone -- gotten smaller?
>
> A. Yes, sir, it's gotten small.
>
> Q. Does it still cause you any tenderness or pain?
>
> A. Yes, sir, it does.

Q. Do you know -- have you talked to anyone about how long you're going to have that scar on your nose?

A. I hadn't talked to anybody. I've got so much going on. I assume it's going to be there... Q. Forever?

A. I'm sure.

(RR8: 96).

Regarding stitching, she testified:

Q. Did you even allow them to put stitches on your nose?

A. No, I would not. They asked -- I took some with me.

She received butterfly stitches to her nose. (RR8: 119). An LVN friend doctored her nose for a week. (RR8: 119).

Perkins would argue that Hyles' speculation as to the permanence of the scar is not sufficient. Serious bodily injury may be established without a physician's testimony when the injury and its effects are obvious. *Sizemore,* 387 S.W.3d at 828. Also, an injured layperson may testify as to the seriousness of her injuries. *Sizemore*, 387 S.W.3d at 828. However, Perkins would argue the jury has not been given enough information to infer permanence.

Furthermore, the jury even more certainly has not been given enough information to find that any permanent effect is serious. Indeed, Hyles' testimony is that the scar is now "small." (RR8: 96).

The Court of Appeals noted, correctly, the relevant issue is the disfiguring effect of the bodily injury as it was inflicted, not after the effects had been ameliorated or exacerbated by other actions such as medical treatment. *Sizemore*, 387 S.W.3d at 828. (Apx. A, p. 9).

However, without aid of expert testimony, the jury could not reasonably infer that but for the minor interventions of butterfly stitching and an LVN friend doctoring her nose for a week that the scarring would have been serious and permanent. Certainly expert testimony would be needed for such a determination.

The Court of Appeals appears to have focused, without specifying, on substantial risk of death. (Apx. A, p. 9-10). However, there was absolutely no evidence that the bleeding posed a serious risk to Hyles if left untreated. Indeed, common sense would dictate that a gash on the nose, save for a diagnosis of hemophelia (entirely absent here), would not pose a serious risk to life. The definition of serious bodily injury has simply not been met, and the Court of Appeals has set an impermissibly and dangerously low bar for proving same.

Issue Two Restated

The Court of Appeals erred in holding the trial court acted within its discretion in allowing the State to introduce extensive details about an

extraneous offense during the guilt-innocence phase when Perkins was willing to stipulate to it.

Argument and Authorities for Issue Two

Outside the jury's presence, the State argued that under Texas Code of Criminal Procedure 38.371, the doctrine of chances, and TRE 404(b)(2), they could introduce evidence Perkins assaulted Sarah Rogers, his girlfriend prior to Hyles. (RR9: 7-9).

Outside the presence of the jury Rogers testified she and Perkins had dated almost seven months prior to February 13, 2016, and cohabitated six months. (RR9: 12).

That night, they went to bed having gone out drinking. (RR9: 13). He assaulted her when she tried to wake him up. (RR9:13-14). He grabbed her by the throat and slung her around. (RR9: 14). He struck her on the head closed fist multiple times. (RR9: 14). She lost consciousness, and when she came to, they wrestled. (RR9: 14). When she woke up she was on the floor at the foot of the bed. (RR9: 15). He threw her a couple of times, and hit her in the ribs. (RR9: 15). He drug her by the hair to the living room. (RR9: 15). She forcefully got away, got her son and called 911. (RR9: 15-6). She had a brain bleed and broken ribs. (RR9: 17-

18).

Defense counsel argued as follows:

The circumstances are completely different. There was no drinking involved, no alcohol involved in this case. There was alcohol involved in that case. Circumstances are completely different. It doesn't show a pattern or a motive. And he's proffering unproven facts at this point.

He's speculating into what we're going to say or what kind of testimony we're going to have, to say that that's going to rebut it. I don't know how he can do that, Your Honor. I think this is a pending case that has nothing to do with this case. As I said, in the name of judicial efficiency, we're willing to stipulate that it happened, but I think any testimony that she could have concerning a pending case that hasn't even been proven yet would be nothing but prejudicial to the jury, and anything that could actually possibly be probatively obtained from that is going to be far outweighed by its prejudicial effect on the jury. And that's unfair to my client. (RR9: 23).

The Court ruled as follows:

All right. On balance, this is what I'm going to find: I rule that the State is not required to accept the stipulation. I, frankly, wish they would, but they are not. So I do find that, on balance, that the probative value does outweigh the prejudicial nature.
And in this case in particular, when you apply the 38.371 newly enacted Code of Criminal Procedure provisions dealing with situations like this where you've got family violence, and it references the Family Code sections that the State is relying on here concerning dating violence, that I do find that this is -- the probative value outweighs the prejudicial nature.
(RR9: 30).

The Court gave the jury the following limiting instruction:

You are instructed that the evidence from Sarah Rogers concerning an alleged offense or offenses, other than the offense alleged in the indictment in this case, may only be considered if, number one, you believe beyond a reasonable doubt that the Defendant committed such other offense, if any; and, two, even then, you may only consider such evidence in determining the intent, motive, or -- of the Defendant, or absence of mistake or lack of

> accident, or to rebut a defensive theory, if any, in connection with the offense alleged against him in the indictment. You are not to consider this evidence for any other purpose. (RR9: 36).

Texas Rule of Evidence 404(b) states:

Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
Permitted Uses; Notice in Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence—other than that arising in the same transaction—in its case-in-chief.

When a trial court balances the probative value of the evidence against the danger of unfair prejudice, a presumption exists that favors the evidence's probative value. *Feldman v. State*, 71 S.W.3d 738, 754-55 (Tex. Crim. App. 2002). The relevant criteria for determining whether the prejudice of admitting the evidence substantially outweighs the probative value include, but are not limited to, the following: (1) the probative value of the evidence; (2) the potential the evidence has to impress the jury in an irrational but nevertheless indelible way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence to prove a fact of consequence. *State v. Mechler*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005). If the record reveals one or more of these considerations

led to a risk that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, then an appellate court should conclude the trial court abused its discretion in admitting the evidence. *See Reese v. State*, 33 S.W.3d 238, 241 (Tex. Crim. App. 2000).

The probative value of the details of the Rogers incident are hugely lessened by the willingness to stipulate. The State's argument is that under the doctrine of chances, that Mr. Perkins would accidentally harm two girlfriends is an unlikely coincidence, essentially establishing absence of mistake, or lack of accident. (RR9: 7-9). Stipulating to the Hyles assault would accomplish this.

Although mitigated by the Court's limiting instruction, there is considerable potential for the evidence to impress the jury in irrational way. The alleged injuries and assault in Rogers' case are far more severe than in the instant case. (RR9: 416). Additionally, the time needed to develop the evidence was substantial. Almost as much of the trial involved the Rogers incident as the Hyles incident. (RR8: 179-180, 194-195; 197-202). This also goes to factor two, whether the jury would be impressed in an irrational yet indelible way. This case was almost as much about the Rogers incident as it was the Hyles incident. Fourth, the State's need for the evidence was minimal. Hyles, an eyewitness and Perkins were available to give their versions of events. The jury could observe the medical and photos. Again, the

willingness to stipulate to the Rogers incident vastly reduces the State's need for the evidence.

The Court of Appeals correctly noted that in general, the State may adduce its testimony as it sees fit, and need not accept a stipulation. (Apx A, p.) Without analysis, it distinguished *Robles v. State*, 85 S.W.3d 211 (Tex.Crim.App. 2002), in which the Court of Criminal Appeals held that the trial court erred in denying a defendant's motion to suppress evidence of prior convictions, relying on Rule 403, when the defendant offered to stipulate to the prior convictions. *Id.* at 212-13.

The Court of appeals acknowledged the four-part test under Rules 403 and 404(b), yet utterly failed to conduct any analysis as to how the facts of this case fit into the test. (Apx. A, p. 7). The Court merely notes that the trial court conducted the test and found the evidence admissible. (Apx. A, p. 7).

Perkins was harmed by the error.

On appellate review, and pursuant to Texas Rule of Appellate Procedure 44.2(b), a non-constitutional error must be disregarded unless it affects the defendant's substantial rights. *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011).

An appellate court will not overturn a criminal conviction for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or influenced the jury only slightly. *Id.* In considering the potential to harm, the focus is not on whether the outcome of the trial was proper despite the error, but whether the error had a substantial or injurious effect or influence on the jury's verdict. *Id.*, at 93-94. In assessing the likelihood that the jury's decision was improperly influenced, the appellate court must consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case. *Id.* The reviewing court may also consider the jury instruction given by the trial judge, the state's theory, defensive theories, closing arguments, voir dire, and whether the state emphasized the error. *Id.*

As for the evidence, Perkins vigorously disputed the charge, and offered an explanation of how Hyles was injured. (RR9: 73-4; 167-8). Weathermon did not see the alleged assault itself, although she does claim to have witnessed blood in the air and hair pulling. (RR8: 19, 21). There is a dispute as to whether Ms. Weathermon was coming or going to the Humane Society. (RR8: 78; SX-1). Hyles herself did not remember any hair pulling, although she said it could have

happened. (RR8: 94). Hyles testified he assaulted her. (RR8: 90). Perkins' credibility was assailed by Rogers, Heather Rye and Deputy Tidwell as to the Rogers incident and his claims about his life with Rogers. (RR9: 170-4; RR9: 179180; RR9: 198-203).

As for the nature of the error, as noted in the Rule 403 analysis, this case was almost as much about Rogers as it was Hyles. (RR8: 83-126; RR8: 179-180; 194-195; 197-202; RR9: 37-58, 170-177). The prejudicial nature is huge.

Obviously, the jury would consider it with the other evidence and conclude that Perkins was of a nature to beat Hyles due to his character.

The State's theory is that Perkins assaulted Hyles purposefully. (RR8: 12-14; 90-1) The defensive theory was that the injury to Hyles was accidental. (RR9: 73-4; RR10: 17)

The State heavily emphasized the Rogers incident and details thereof in closing. (RR10: 35-6). Perkins' counsel of necessity had to address the vast amount of testimony pertaining to Rogers. (RR10: 10-11, 16).

The Court of Appeals cited *Hung Phuoc Le v. State*, 479 S.W.3d 462, 471 (Tex. App.—Houston [14th Dist.] 2015, no pet.), for the proposition that generally courts assume an instruction regarding consideration of evidence. (Apx. A, p. 7).

Again, while this is correct, the Court of Appeals did not give any analysis as to why under the facts of this particular case it sufficiently ameliorated any harm.

The bottom line is that this trial was almost as much about a more severe extraneous offense as it was about the charged incident to an absurd degree. It would be nigh impossible to be fairly assured that Perkins was not harmed.

PRAYER FOR RELIEF

Perkins is entitled for the State to have to prove the more serious offense of causing serious bodily injury. The Court of Appeals significantly lowered the bar beyond what this Court has held to be serious bodily injury. Although unpublished, the Court of Appeals' decision will doubtless be cited by various district attorneys in cases where, like this one, the evidence of injury is insufficient to establish serious bodily injury, thereby confusing this area of jurisprudence. Additionally, without analysis, the Court of Appeals held that the trial court acted within its discretion in allowing the trial to be almost as much about an extraneous offense as the charged offense. Without Court of Criminal Appeals correction, prosecutors will have a dangerous opinion to cite regarding the 403/404(b) balancing test.

Respectfully submitted,

/s/Frederick Dunbar_____
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CERTIFICATE OF COMPLIANCE

Appellant's Petition for Discretionary Review, according to the word count function of counsel for Appellant's word-processing software, contains 4059 words, even **in**cluding the segments permitted to be excluded from the count, save for the Appendix. Accordingly, Appellant respectfully certifies compliance.

/s/Rick Dunbar
Rick Dunbar

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2020, a true and correct copy of the above and foregoing was forwarded to the District Attorney and the State Prosecuting Attorney in a manner consistent with the requirements of the law.

/s/Rick Dunbar
Rick Dunbar

APPENDIX

Opinion filed February 28, 2020

In The

Eleventh Court of Appeals

No. 11-18-00037-CR

MICKEY RAY PERKINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 35th District Court
Brown County, Texas
Trial Court Cause No. CR24903

M E M O R A N D U M O P I N I O N

The grand jury indicted Mickey Ray Perkins for the first-degree felony offense of aggravated assault with a deadly weapon against a family member. *See* TEX. PENAL CODE ANN. § 22.02 (West 2019). The jury found Appellant guilty of the offense and assessed his punishment at confinement for twenty-seven years and a fine of $5,000. The trial court sentenced him accordingly. We affirm.

On appeal, Appellant raises three issues. First, Appellant claims that the trial court committed error when it allowed the State to present extensive details of an extraneous offense in the guilt/innocence phase of trial although Appellant had offered to stipulate to the offense. In his second issue on appeal, Appellant claims that the evidence was legally insufficient to establish serious bodily injury. Finally, in his third issue on appeal, Appellant claims that he received ineffective assistance of counsel.

On the date of the offense, Appellant and Lana Hyles met at the Brownwood Regional Medical Center. Appellant and Hyles had been in a relationship prior to this date. The reason that they met at the medical center is disputed. Hyles claimed that Appellant wanted to borrow her vehicle and that he was going to take her to her apartment after he met her at the medical center. Appellant, on the other hand, claimed that Hyles had called him and wanted Appellant to drive her around to run some errands.

In any event, Appellant was the one who drove Hyles's vehicle away from the medical center. When Appellant did not turn in the direction of Hyles's apartment, Appellant and Hyles began to argue. Hyles claimed that she asked Appellant where he was going and that Appellant then "pushed [her] head into the console of the [vehicle]" and caused her to start bleeding. She testified that Appellant grabbed her by the neck and held her down. In contrast, Appellant testified that Hyles became upset after Appellant told her that he had told Hyles's ex-husband that he believed that Hyles was doing drugs. Appellant claimed that at this point, while the vehicle was still in motion, Hyles put the vehicle into either reverse or park as Appellant simultaneously applied the brakes and that Hyles hit her face on the console of the vehicle. Appellant testified that Hyles had "a gash in her nose and she was bleeding."

Subsequently, Hyles got out of the vehicle. After Hyles was out of her vehicle, Carrol Weathermon, a stranger to both Hyles and Appellant, pulled up behind Hyles's vehicle to assist after she saw "blood in the air." Weathermon testified that she saw Hyles "crumpled on the ground" and Appellant standing over Hyles. She testified that Appellant had Hyles by the hair and was trying to pull Hyles back to her vehicle. However, Hyles testified that she did not recall that Appellant pulled her hair to drag her back to her vehicle.

After Hyles noticed Weathermon, Hyles got into Weathermon's vehicle and Weathermon took Hyles to the emergency room at the Brownwood Regional Medical Center. Appellant drove ahead of them in Hyles's vehicle in the direction of the hospital. On the way to the hospital, Weathermon called 9-1-1 and reported the license plate number of Hyles's vehicle. She also reported that she was taking Hyles to the emergency room; officers were sent to the hospital as a result of the 9-1-1 call. Hyles did not stay at the hospital very long and left against medical advice. In fact, she testified: "I bet I wasn't even there an hour." She did not allow the hospital personnel to put stitches in her nose.

At trial, at a hearing outside the presence of the jury, the State told the trial court that it wanted to introduce testimony about an unadjudicated extraneous offense of assault. The State sought to admit the testimony of Appellant's former girlfriend, Sarah Rogers. The State announced that Rogers would testify to an alleged assault committed by Appellant against her. The State argued that, under Article 38.371 of the Texas Code of Criminal Procedure, this type of evidence would be relevant. *See* TEX. CODE CRIM. PROC. ANN. art. 38.371 (West Supp. 2019). The State further argued that the testimony would be admissible under Rule 404(b) of the Texas Rules of Evidence to rebut the defensive theory that Hyles caused her injury herself when she shifted the vehicle into either reverse or park while the

vehicle was still in motion. The State also argued that Rogers's testimony would show motive and absence of mistake or lack of accident.

Appellant's trial counsel argued that Rogers's testimony about the extraneous offense should not be allowed because Appellant offered to stipulate to the assault. Appellant's counsel also argued that the testimony would be more prejudicial than probative and would confuse the jurors.

The trial court ultimately allowed Rogers to testify to the extraneous assault to show intent and motive, to rebut a defensive theory, and to show absence of mistake. The trial court ruled that the State was not required to accept Appellant's offer to stipulate, and it also found that the probative value of the testimony outweighed its prejudicial nature. The trial court also provided a limiting instruction to the jury in which it instructed the jury that Rogers's testimony could only be considered if the jury believed beyond a reasonable doubt that Appellant committed the extraneous offense and, if so, that it could only consider her testimony to determine intent, motive, absence of mistake or lack of accident, or to rebut a defensive theory "in connection with the offense alleged against [Appellant] in the indictment."

First, we will discuss Appellant's claim that the trial court should not have allowed Rogers to testify to the extraneous offense. At trial, Rogers testified that she first met Appellant on social media when both she and Appellant lived in Arkansas and that, in 2015, she eventually moved to Texas with Appellant. Appellant, Rogers, and Rogers's son lived together.

Rogers testified that, on one occasion, she and Appellant had been out drinking and later went home and went to bed. During the night, for reasons that she could not remember, she awakened Appellant. She testified that Appellant woke up "[v]ery mean" and that an argument ensued. Rogers said that Appellant struck her with a closed hand because "[she] wouldn't stop talking" and that Appellant

"started punching [her] wherever he could." She also testified that, during the assault, she lost consciousness but that, when she woke up, she was on the floor and Appellant was still hitting her.

Rogers told the jury that the assault ended when Appellant dragged her, by her hair, from the bedroom to the living room. After she put on her clothes, she got her son, went outside, locked herself and her son in the car, called 9-1-1, and waited for law enforcement to arrive. Rogers also testified about her injuries. She stated that, as a result of the assault, she sustained bruises around her neck, a black eye, scratches on her face, and two broken ribs. She also testified that the results of a CT scan revealed that she had suffered a brain bleed.

Appellant argues that the trial court committed error when it allowed Rogers to testify to the details of the extraneous assault in the guilt/innocence phase of the trial even though Appellant offered to stipulate to the offense. Absent circumstances not relevant here,[1] the State was not required to accept Appellant's offer to stipulate. *Rodriguez v. State*, 373 S.W.2d 258, 259 (Tex. Crim. App. 1963) ("The State may adduce its testimony as it sees fit, and it may or may not agree to a stipulation."); *Castillo v. State*, No. 08-02-00199-CR, 2003 WL 21674197, at *11 (Tex. App.—El Paso July 17, 2003, no pet.) (not designated for publication); *Sinclair v. State*, No. 14-96-01564-CR, 1999 WL 649072, at *3 (Tex. App.—Houston [14th Dist.] Aug. 26, 1999, pet. ref'd) (not designated for publication).

"Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX. R. EVID. 404(b)(1). Further, even relevant evidence may be inadmissible if its probative value is "substantially outweighed by

[1] *See, e.g., Robles v. State*, 85 S.W.3d 211 (Tex. Crim. App. 2002) (involving offer to stipulate to jurisdictional DWI enhancement).

a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403. Evidence is relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence" and if "the fact is of consequence in determining the action." TEX. R. EVID. 401.

Evidence of a crime, wrong, or other act may be admissible for a purpose other than character conformity, such as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2). Evidence of extraneous acts may also be admitted to rebut a defensive issue that negates an element of the charged offense. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009).

"Whether extraneous offense evidence has relevance apart from character conformity, as required by Rule 404(b), is a question for the trial court." *Martin v. State*, 173 S.W.3d 463, 466 (Tex. Crim. App. 2005) (quoting *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003)). Indeed, "[t]he standard of review for a trial court's ruling under the Rules of Evidence is abuse of discretion." *Id.* at 467 (quoting *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004)). This means we will only overrule a trial court's decision on the admissibility of evidence if that decision is outside the zone of reasonable disagreement. *Id.*

To be admissible under both Rule 404(b) and 403 of the Texas Rules of Evidence, the extraneous evidence must satisfy a two-prong test: the extraneous offense must be relevant to a fact of consequence apart from its tendency to prove conduct in conformity with character, and the probative value of the evidence must not be substantially outweighed by unfair prejudice. *Id.* When the trial court balances probative value against unfair prejudice, the trial court should consider:

> (1) the strength of the evidence in making a fact more or less probable; (2) the potential of the extraneous-offense evidence to

> impress the jury in some irrational but indelible way; (3) the amount of time the proponent needed to develop the evidence; and (4) the strength of the proponent's need for the evidence to prove a fact of consequence.

Hung Phuoc Le v. State, 479 S.W.3d 462, 471 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *see Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999).

As we previously noted, in a hearing outside the presence of the jury, Appellant's counsel objected to the admission of Rogers's testimony. Counsel argued that it was more prejudicial than probative and would confuse the jurors. The State argued that the testimony was relevant to rebut Appellant's defensive issue and to show motive, as well as absence of mistake and lack of accident. When the trial court ruled, it stated: "I do find that, on balance, that the probative value does outweigh the prejudicial nature. . . . [I]t can be admitted to show the intent and the motive of the Defendant in this case, as well as . . . to rebut a defensive theory, and to show absence of mistake . . . ."

It is clear from the trial court's statement that the trial court found Rogers's testimony to be admissible under Rule 404(b) and also conducted the necessary two-prong test under Rule 403. *See Patterson v. State*, 496 S.W.3d 919, 929 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (when the trial court weighs the relevance of the evidence against its prejudicial impact, it need not formally announce on the record that it has conducted this balancing test). The trial court's ruling under Rule 404(b) was not outside the zone of reasonable disagreement. *See Grider v. State*, 69 S.W.3d 681, 689 (Tex. App.—Texarkana 2002, no pet.) (upholding the admission of testimony from defendant's prior girlfriend about a previous assault). Further, because "[w]e generally presume a jury followed a trial court's instruction regarding consideration of evidence," any potential harm was mitigated by the trial court's limiting instruction to the jury. *Hung Phuoc Le*, 479 S.W.3d at 472. Thus, the trial court did not abuse its discretion when it allowed

Rogers to testify to the extraneous offense. We overrule Appellant's first issue on appeal.

Next, we will discuss Appellant's challenge to the sufficiency of the evidence. In his second issue on appeal, Appellant claims that the evidence was legally insufficient to establish the serious bodily injury element of the offense.

For a challenge to the sufficiency of the evidence, we review all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). The trier of fact is the sole judge of the weight of the evidence and the credibility of the witnesses. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *Isham v. State*, 258 S.W.3d 244, 248 (Tex. App—Eastland 2008, pet. ref'd). We defer to the trier of fact's resolution of any conflicts in the evidence and presume that the trier of fact resolved such conflicts in favor of the verdict. *Jackson*, 433 U.S. at 326; *Brooks*, 323 S.W.3d at 899; *Clayton v. State*, 235 S.W.3d 722, 778 (Tex. Crim. App. 2007).

A person commits assault if the person "intentionally, knowingly, or recklessly causes bodily injury to another." PENAL § 22.01(a)(1). A person commits the first-degree felony of aggravated assault against a family member if the actor uses a deadly weapon in the commission of the assault and causes serious bodily injury to another person whose relationship with the actor is described by the relevant sections of the Texas Family Code, which includes a dating relationship as defined by Section 71.0021(b) of the Family Code. PENAL § 22.02(b)(1); *see* TEX. FAM. CODE ANN. § 71.0021(b) (West 2019).

"Serious bodily injury" is injury "that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of

the function of any bodily member or organ." PENAL § 1.07(a)(46) (West Supp. 2019). "There are no wounds that constitute 'serious bodily injury' *per se*." *Sizemore v. State*, 387 S.W.3d 824, 828 (Tex. App.—Amarillo 2012, pet. ref'd). Instead, what constitutes serious bodily injury must be determined on a case-by-case basis. *Id.*

Further, the relevant issue is the extent of the injury as inflicted. "[A]n appellate court should not consider the amelioration or exacerbation of an injury by actions not attributable to the offender, such as medical treatment." *Blea v. State*, 483 S.W.3d 29, 35 (Tex. Crim. App. 2016). "However, in evaluating the evidence supporting serious bodily injury, courts do consider . . . whether the injury would be permanently disfiguring without medical treatment." *Sizemore*, 387 S.W.3d at 829. In addition, serious bodily injury can be established without a physician's testimony "when the injury and its effects are obvious. The person who sustained the at-issue injury is qualified to express an opinion about the seriousness of that injury." *Id.* at 828 (citation omitted).

At trial, Weathermon testified that "[Hyles's] nose was bleeding profusely. She was . . . just dripping." While no physician testified, Hyles testified that she still had a scar from her injury over a year after the incident, that the cut still caused her tenderness and pain, that the swelling because of the cut disrupted the use of her nose for "some time," and that she assumed she would have a scar forever. Hyles also testified that her friend, April Wooldridge, a licensed vocational nurse, treated her nose every day for a week after Hyles left the hospital. Additionally, one of the responding officers testified that Hyles had a "very large gash on her nose." Even Appellant testified that Hyles had "a gash in her nose and she was bleeding."

State's Exhibit No. 1 was a recording of the 9-1-1 call, on which Hyles could be heard in the background. She stated on the call: "I need the emergency room," "I'm bleeding everywhere," and "I'm in a lot of pain." State's Exhibit Nos. 2

through 5 were photographs taken by police officers. The photographs depict Hyles's injuries when she was at the hospital. The photographs reflect the fact that there was blood all over Hyles's face and arms. Also, State's Exhibit Nos. 12 and 13 were photographs of the interior of Hyles's vehicle where the assault occurred. In these photographs, blood can be seen on the console and on the passenger seat.

From the evidence described above, viewed in the light most favorable to the verdict, a rational juror could have found beyond a reasonable doubt that Hyles's injury constituted serious bodily injury. Thus, we find that the evidence is sufficient to establish the serious bodily injury element of the offense. We overrule Appellant's second issue on appeal.

Finally, we will discuss Appellant's third issue, in which Appellant claims that he received ineffective assistance of counsel. Specifically, Appellant argues that his trial counsel should have objected to the applicability of Article 38.371 of the Texas Code of Criminal Procedure as a basis for the admission of Rogers's testimony.

Generally, to determine whether Appellant's counsel rendered ineffective assistance, we must first determine whether Appellant has shown that his counsel's representation fell below an objective standard of reasonableness and, if so, then determine whether there is a reasonable probability that the result would have been different but for his counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694; *Hernandez*, 726 S.W.2d at 55.

Further, we must indulge a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance, and Appellant must overcome the presumption that the challenged action could be considered sound trial strategy. *Strickland*, 466 U.S. at 689; *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim.

App. 2000). "A vague, inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally incompetent." *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002).

Allegations of ineffective assistance of counsel must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999). Typically, the record on direct appeal is not sufficient to show that counsel's representation was so deficient as to overcome the presumption that counsel's conduct was reasonable and professional. *See Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002); *Mallett v. State*, 65 S.W.3d 59, 64–65 (Tex. Crim. App. 2001). In addition, if an appellant does not prove one component of the *Strickland* test, there is no need for the court to address the other. *Strickland*, 466 U.S. at 697.

Here, Appellant's trial counsel objected to the admission of the extraneous offense testimony and argued that the testimony was more prejudicial than probative. While the State and the trial court briefly mentioned Article 38.371 of the Texas Code of Criminal Procedure, the trial court's decision did not primarily rely on this article. Ultimately, the trial court admitted the testimony because it found that the evidence was admissible under Rules 403 and 404(b) of the Texas Rules of Evidence. Therefore, Appellant's counsel's objection was appropriate. Appellant has not shown that the failure to make an additional objection under Article 38.371 amounted to deficient performance.

As a result, Appellant has not met his burden, under the first prong of *Strickland*, to show that his trial counsel's performance fell below an objective standard of reasonableness. Therefore, we overrule Appellant's third issue on appeal.

We affirm the judgment of the trial court.

JIM R. WRIGHT

SENIOR CHIEF JUSTICE

February 28, 2020

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[2]

Willson, J., not participating.

[2]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.

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